

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

DARREN DEWBERRY,)	
)	
Petitioner,)	
)	
v.)	No. CIV-06-118-L
)	
JUSTIN JONES, Director,)	
)	
Respondent.)	

ORDER

This matter is before the court for review of the Supplemental Report and Recommendation entered by the Honorable Gary M. Purcell on April 21, 2006, in which he recommended petitioner be directed to show cause why this action should not be dismissed as procedurally barred. In response, petitioner argues he can demonstrate cause for the procedural default and prejudice resulting therefrom. In addition, petitioner argues he is actually innocent of the misconduct charged against him because infraction code 05-5 did not exist at the time of his alleged infraction.

Pursuant to 28 U.S.C. § 636(b), the court must “make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” In accordance with this mandate, the court has reviewed the Report and Recommendation, petitioner’s show cause response, and the case file. Based on that review, the court concludes the Report and Recommendation should be adopted in its entirety and this action should be

dismissed for failure to exhaust. Petitioner has not demonstrated cause for the failure to exhaust his administrative remedies. Indeed, he offers no explanation for this failure. Likewise, petitioner cannot establish that he is factually innocent of the infraction charged. Petitioner does not contend that he did not commit the infraction as alleged; rather he complains that no infraction number 05-5 existed at the time he was charged. This does not constitute factual innocence. The court thus finds petitioner has not established cause and prejudice to overcome the procedural bar.

The Petition for a Writ of Habeas Corpus, Pursuant to Title 28 U.S.C.A. Section 2241(c)(4) (Doc. No. 1) is therefore dismissed as procedurally barred. Respondent's Motion to Dismiss (Doc. No. 10) is DENIED. Judgment will issue accordingly.

It is so ordered this 9th day of August, 2006.



TIM LEONARD
United States District Judge